Supreme Court, U.S.
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No. 95 -

IN THE
SUPREME COURT OF THE UNITED STATES

Term, 1996

C & D CHARTER POWER SYSTEMS, INC.,
Petitioner

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

APPENDIX

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C & D Charter Power Systems, Inc. ***and*** **International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW.** Case 2-CA-24906

August 25, 1995

DECISION AND ORDER

By Chairman Gould and Members Stephens and Browning

On November 2, 1994, Administrative Law Judge D.Barry Morris issued the attached decision. The Respondent and the General Counsel filed exceptions and supporting briefs, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions, as further discussed below, and to adopt the recommended Order.

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[1] The Respondent and the General Counsel have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products.* 91 NLB 544(1950), enfd 88 F.2d 363 (3rd Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The judge found, and we agree, that the Respondent violated Section 8(a)(1) and (3) of the Act by warning, suspending, and discharging employee Robert Williamson because he engaged in activities protected by the Act. In its exceptions, the Respondent argues, inter alia, that Williamson's conduct was not "concerted" within the meaning of the Act. For the reasons set forth below, we find no merit in this contention.

The events in this case occurred in the context of a union organizational campaign. During the fall of 1990, and continuing until the election on January 31, 1991, the Respondent expressed its antiunion sentiments in 50 or 60 mandatory meetings it held with employees, many of which lasted approximately one and one-half hours. The record shows that employees were annoyed that they were required to attend these numerous antiunion meetings and to forego the extra income they could have earned on the production line under the Respondent's piece incentive program. The record also shows that employees conveyed this annoyance to the Respondent's officials during the meetings.

On January 7, 1991, the Respondent held one of its many meetings with employees concerning the Union's organizing campaign. Plant Manager Arthur Imdorf read a prepared speech. At one point, Williamson interrupted the speech, stating that he would rather perform his job than attend these antiunion meetings. Imdorf told employees to hold their questions until after his presentation. Williamson then exclaimed, "Don't interrupt him; he might lose his place." Imdorf replied that he would not, and he completed his speech without further incident.

The Respondent held another mandatory meeting on January 25, 1991. This meeting began at approximately 1:30 p.m. and continued to approximately 3 p.m. After

Imdorf completed his presentation, one employee asked "[W]hy don't you give us the respect of choosing whether to come to these meetings or not. And not make them mandatory because it's costing us money?" Imdorf replied that the meetings would continue until he said otherwise. Williamson then raised his hand, said he had a two-part question, and asked, "How many more of these meetings are we going to have?" At that point, Imdorf exclaimed, "I've heard this question over a hundred times in every meeting. I'm getting tired of this question. These meetings are going to continue until I say that we don't have these meetings anymore." Imdorf then told Williamson to ask his question. Williamson initially said, "You're worthless," but then immediately retracted the remark. Stating "Whoa, I don't mean you personally. But the question was worthless."

It is well established that individual action will be considered "concerted" if "the concerns expressed by the individual are [a] logical outgrowth of the concerns expressed by the group." *Mike Yurosek & Son*, 306 NLRB 1037, 1038 (1992), and cases cited therein. enfd. 53 F.3d 261 (9th Cir. 1995); see *Ewing v. NLRB*, 861 F.2d 353, 361 (2d Cir. 1988). It is also firmly established that union activity is, "by definition . . . concerted within the meaning of Sec. 7 of the Act, without regard to the fact that [an employee] may have acted alone." *Carpenters Local 925*, 279 NLRB 1051, 1059 fn. 40 (1986)

We find that both of these principles are applicable here. At the meetings, Williamson expressed his displeasure at being required to be in attendance, and he stated that he would rather be working. Williamson's comments constituted concerted activity because they were the logical outgrowth of the prior concerted complaints the employees voiced about being required to attend the Respondent's numerous meetings and to lose the incentive

pay they could otherwise be earning. Indeed, Imdorf himself acknowledged that Williamson's question at the January 25, 1991 meeting reflected a group concern because Imdorf answered it by stating that he had heard it "over a hundred times" and "in every meeting."

Furthermore, as the judge found, Williamson was an active union adherent, and his outspoken opposition to the Respondent's meeting was a further expression of his union sentiment. Because Williamson's remarks constituted union-related activity, it is irrelevant that he acted alone.

Accordingly, for all these reasons, we find no merit in the Respondent's claim that Williamson's conduct was not concerted. We further find, for the reasons stated by the judge, that Williamson's remarks did not exceed the protections of the Act. Accordingly, we conclude, in agreement with the judge, that the Respondent's discipline and discharge of Williamson violated Section 8(a)(1) and (3) of the Act.[2]

ORDER

The National Labor Relations Board Adopts the recommended Order of the administrative law judge and

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[2] As they state in *Liberty Natural Products*, 314 NLRB 630 fn. 4 (1994), Chairman Gould and Member Browning question the validity of the ultimate holding in *Meyers I & II*, 268 NLRB 493 (1984), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 487 U.S. 1205 (1988). They note, however, that the conduct here would be found concerted even under the standard of those cases. 268 NLRB at 497; 281 NLRB at 382.

orders that C & D Charter Power Systems, Inc., Huguenot, New York, its officers, agents, successors, and assigns, shall take the action set forth in the order.

Dated, Washington D.C. August 25, 1995.

William B. Gould IV, Chairman

James M. Stephens, Member

Margaret A. Browning, Member

(SEAL) National Labor Relations Board

Nancy K. Reibstein, Esq. and *Larry Singer, Esq.*, for the General Counsel.

Robert S. Mirin, Esq. (Mirin & Jacobson), of Harrisburg, Pennsylvania, and *Steven J. Seglarz, Esq.*, of Plymouth Meeting, Pennsylvania, for the Respondent.

UNITED STATES OF AMERICA
BEFORE THE NATION LABOR RELATIONS BOARD
DIVISION OF JUDGES

C & D CHARTER POWER SYSTEMS, INC.

and Case 2-CA-24906

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW

Nancy K. Reibstien, Esq. and
Larry Singer, Esq.,
Brooklyn, NY for the
General Counsel.
Robert S. Mirin, Esq.
(Mirin & Jacobson),
Harrisburg, PA and
Steven J. Weglarz, Esq.,
Plymouth Meeting, PA for the
Respondent

DECISION

Statement of Case

D. Barry Morris, Administrative Law Judge. This case was heard before me in New York City on December 7 and 8, 1993, January 18 through 21, 1994, and April 5 through 8, 1994. Upon a charge filed on February 1, 1992, and amended on December 7, 1993, alleging that C

& D Charter Power Systems, Inc.[1] (Respondent) violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). Respondent filed an answer denying the commission of the alleged unfair labor practices.

The parties were given full opportunity to participate, produce evidence, examine and cross-examine witnesses, argue orally, and file briefs.[2] Briefs were filed by the parties on June 21, 1994. In addition, a reply brief was filed by Respondent on July 21, 1994.

On the entire record of the case, including my observation of the demeanor of the witnesses, I make the following

Findings of Fact

I. Jurisdiction

Respondent, a Delaware corporation with an office and place of business in Huguenot, New York, is engaged in the manufacture and nonretail sale of batteries. Annually it purchases and receives goods valued in excess of $50,000 directly from points located outside the State of New York. Respondent admits, and I so find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. In addition, it has been admitted and I find, that International Union, United Automobile, Aerospace & Agricultural Implement Workers

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[1] The correct name of Respondent is C & D Charter Power Systems, Inc. The caption has been amended accordingly.

[2] General Counsel's motion to correct the transcript is hereby granted.

of America, UAW (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

In the fall of 1990,[3] the Union initiated an organizing effort at Respondent's Huguenot facility. Robert Williamson, an employee in the assembly department, testified that he learned of the union organizing campaign and attended a union meeting at the home of employee Gregg Oliver. Williamson testified that he attended approximately five union meetings at various offsite locations. In January 1991, on two separate occasions, Williamson distributed union leaflets to approximately 20 employees in the cafeteria. Williamson testified that during October 1990, he and the other assembly department employees wore black armbands to signify their support of the Union. He further testified that towards the end of October Respondent distributed vote "no" buttons. Williamson took two of the buttons and taped over the "no" and wrote "yes" instead. Williamson testified that he wore the button to one of the management meetings at which time Plant Manager Arthur Imdorf commented, "there's a man who knows what he wants." Williamson further testified that at a management meeting at the end of October or at the beginning of November Williamson stated "this is why we need a union in this facility." After Human Relations Manager Harry Fronjian and Assembly Department Supervisor Robert Balmos

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[3] All dates refer to 1990 unless otherwise specified.

stated that they hoped a union would never come into the facility, Williamson testified that he said "the union is the only way we're going to straighten this mess out."

B. *December 21, 1990 Meeting*

On the afternoon of December 21, the day before the Christmas break, Respondent conducted a plant-wide mandatory meeting at which the president of the company, Al Weber spoke. Williamson testified that Weber said that the company was "operating with three facilities too many at that time and that they were very unhappy with ...our lack of enthusiasm or respect we were showing them." Williamson further testified that Weber stated "if we voted and got a union and the union wanted raises that they would have to close the plant down because it was losing money." In addition, Williamson testified that Weber stated that if the Union came in, the company would not refurbish the oxide mills.

The record contains the text of Weber's speech. The text of the speech states, in pertinent part:

> . . . if C & D had closed the Huguenot plant last year, and had closed out its motive power operations in Perth, the company would have had a much better financial performance in 1990 than it did.
>
> . . . We could achieve some real cost savings and maybe hang on to the motive power business longer if maybe hang on to the motive power business longer if we consolidated our operations at Perth, or at Huguenot, or at some other location . . . Because of the current economic conditions

we may have one or two plants too many right now . . . .

Now, on tope of all these business considerations and economic problems facing this plant, the UAW has shown up and asked for an election. Words cannot express my extreme disappointment about this situation. I simply cannot believe that we are going to have to go through another election campaign at Huguenot. Particularly, since a year ago I thought we had established a commitment to one another to continue working together as one team, without a union . . .

There is no doubt that we are in a crisis situation here at Huguenot. Make no mistake about that. This plant is at a cross-roads. Because of its economic situation, this plant's future is uncertain . . .

C. January 7, 1991 meeting

Imdorf presented another speech to the assembly department on January 7, 1991. Williamson testified that Imdorf was reading a prepared speech in which he stated that "we didn't need a union" and "told us his feeling about how unions are disruptive and he feels that the plant didn't need that." Imdorf asked the employees to hold heir questions, at which point Williamson called out "Yeah, he might lose his place." After the meeting, Imdorf told Williamson that "he didn't care for my comment in the meeting." Several minutes later Fronjian called Williamson into his office and according to Fronjian's testimony, asked Williamson why he interrupted Imdorf. Williamson replied "I was mad and I was a little bit angry

that he was reading from prepared notes." Fronjian then issued a verbal warning to Williamson.

D. *January 25, 1991 Meeting*

On January 25, 1991 Imdorf conducted another mandatory meeting with the assembly and maintenance departments. When Imdorf completed his presentation, several employees asked questions. After employee, Bob Warden, asked a question, Williamson raised his hand and said that he had a two-part question. Williamson then asked "how many more of these meetings are we going to have?" Williamson testified:

> At the time after Mr. Imdorf jumped out from behind the podium pointing at me, screaming, yelling I've heard this question over a hundred times in every meeting. I'm getting tired of this question. These meetings are going to continue until I say that we don't have these meetings anymore.

After that exchange Imdorf went back behind the podium and told Williamson to proceed with his question. At that point Williamson called out "you're worthless." Williamson testified that he immediately said "I don't mean you personally, but the question was worthless".

Immediately after the conclusion of the meeting Williamson proceeded to the office of his supervisor, Robert Balmos. Williamson asked Balmos if he could arrange a meeting with Imdorf so that Williamson could apologize once again. Balmos said that he would see what he could do. Later, Williamson was called to Fronjian's office. Fronjian told Williamson that he was being suspended because of his remark during the meeting.

Williamson replied that he had mistakenly made the remark, that it was not what he had intended to say and that he had immediately corrected himself after the remark. Williamson testified that Fronjian replied "it doesn't matter how sorry you are, you are still suspended." At that point Williamson stated "why don't you do what you really want to do and fire me." Williamson then left Fronjian's office he shouted "f--you, f-- this place." Williamson then went to the locker room to take a shower. Richard Haring, a maintenance department employee, testified that Williamson "started pounding on the lockers." John Tice, the second-shift supervisor, testified that after Williamson took his shower he told Williamson, "I understand that you've quit, and you know that's the way we're going to record it and we'll let the unemployment know." Tice testified that Williamson then got "upset and furious" and told him "you f-- people, it's you guys are doing it . . . I'm going to f-- kill you." Williamson denied that he made any threats to Tice.

III. DISCUSSION AND CONCLUSIONS

1. Threat of Plant Closure and Loss of Benefits

The amended complaint alleges that at the December 21 meeting Weber threatened employees with plant closure and with loss of benefits if they chose to be represented by the Union. Williamson testified that at that meeting Weber stated "if we voted and got a union and the union wanted raises that they would have to close the plant down because it was losing money". In addition, Williamson testified that Weber stated if the Union came in they would not refurbish the oxide mills. Arnold Schure, an assembly department employee, remembered Weber saying that "if we all work together we can solve all our

problems, we don't need a union butting in to try to help solve problems, that we could do it ourselves. And that we're all at a crossroads about our jobs". Steven Weglarz, Respondent's General Counsel, testified that he instructed Weber "to make sure that he read every word from the prepared document". Weglarz testified that he had a copy of the speech and followed it word for word as Weber read it. Fronjian corroborated Weglarz' testimony and stated that Weber was instructed by Welglarz "not to deviate from the script or the text". Similarly, Imdorf testified that Weber read from a prepared text. The text of the speech is in evidence. I credit Weglarz' testimony, which was corroborated by Fronjian and Imdorf. Weber was instructed by the company's General Counsel not to deviate from the prepared text. I believe it is likely that he followed those instructions. See *King Trucking Co.*, 259 NLRB 725, 728 (1981). Accordingly, I find that the text of the speech in evidence contains the remarks made at the meeting by Weber.

In *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969), the Court Stated:

> [A]n employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a "threat of reprisal or force or promise of benefit". He may even make a prediction as to the precise effects he believes

> unionization will have on his company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant in case of unionization.

In the speech Weber stated that "I can only hope that the faith I have had in this operation was justified. I must admit, however, that certain recent events have caused me to question this faith". Weber continued:

> Now, on top of all of these business considerations and economic problems facing this plant, the UAW has shown up and asked for an election. Words cannot express my extreme disappointment about this situation. I simply cannot believe that we are going to have to go through another election campaign at Huguenot. Particularly, since a year ago I thought we had established a commitment to one another to continue working together as one team, without a union.

> . . . There is no doubt that we are in a crisis situation here at Huguenot. Make no mistake about that. This plant is at a crossroads. Because of its economic situation, this plants future is uncertain, but no union, not the Teamsters, not the UAW, and not any other union, can provide people with job security.

I believe that the speech clearly conveys the message that if the Union is voted in there's a strong possibility that Respondent will close its Huguenot facility. Thus, Weber stated that he "thought we had a team here, and a commitment to one another." After he stated that he "can only hope that the faith I have had in this operation was justified" he continued "certain recent events have caused me to question this faith". After discussing the necessity to consolidate Respondent's operations at Perth or Huguenot Weber stated "if we are going to consolidate any operations, we first have to decide which plant would be the best one for this consolidation". Weber then stated that "words cannot express my extreme disappointment" about the Union coming and seeking an election. Finally, Weber stated that there is no doubt that "we are in a crisis situation here at Huguenot. Make no mistake about that. This plant is at a crossroads". Respondent provided no objective evidence that a decision to close the Huguenot plant would be based on demonstrably probable consequences beyond its control. See *Gissel Packing Co.*, supra, 395 U.S. at 618. Accordingly, I find that Respondent threatened employees with plant closure if they chose to be represented by the Union, in violation of

Section 8(a)(1) of the Act. See *Seville Flexpack Corp.*, 288 NLRB 518, 531 (1988).

With respect to the allegation that Weber threatened employees with loss of benefits, Williamson testified that Weber stated if the Union came in that the company would not refurbish the oxide mills. No witness corroborated Williamson's testimony and I find nothing in the written speech to substantiate the allegation. Accordingly, I find that General counsel has not shown by the preponderance of the evidence that the statement was made and I therefore dismiss the allegation.

2. Regressive Bargaining

The amended complaint alleges that during meetings with employees from November 1990 through January 1991 Respondent's representatives threatened that it would bargain from scratch regarding employee wages and benefits if the employees chose to be represented by the Union. The standard for determining whether statements of this type violate Section 8(a)(1) of the Act is set out in *Taylor-Dunn Mfg. Co.*, 252 NLRB 799, 800 (1980), as follows:

> It is well established that "bargaining from ground zero" or "bargaining from scratch" statements by employer representatives violate Section 8(a)(1) of the Act if, in context, they reasonably could by understood by employees as a threat of loss of existing benefits and leave employees with the impression that what they may ultimately receive depends upon what the union can induce the employer to restore.

> On the other hand, such statements are not violative of the Act when other communications make it clear that any reduction in wages or benefits will occur only as a result of the normal give and take of negotiations.

See also *Lear-Siegler Management Service*, 308 NLRB 393 (1992).

Oliver Morgan, Jr., a maintenance department employee, testified that Respondent's representatives said "with the union getting it, it would make things difficult for the company to negotiate sales, because of bargainings, there could be pay raises, . . . when unions got in everything started from scratch, everything was scratch, we lost everything we had . . . ." Morgan was not able to specify exactly who made the statement or at which meeting. Oliver testified that Weglarz said "our wages would have to start from zero again . . . there was nothing guaranteed by the union". Weglarz testified, as follows:

> Orville Morgan, Jr., was one of the employees that asked a question and he asked me "Isn't it really true, Mr. Weglarz, that when you negotiate a union contract that you start from what you have?" and I said "That's not true". As the tape indicated, collective-bargaining is a give and take process and each party that goes to the table has different interests and the idea behind it is that they work with each other until they arrive at a mutual, agreeable package, and I indicated to him and to the people in that room that sometimes collective-bargaining

resulted in more, sometimes it resulted in the same and sometimes it resulted in less . . .

I credit Weglarz' testimony. I believe, that as an attorney familiar with labor law, it is likely he would have been careful to use language which would not violate the Act. See *King Trucking Co.*, supra, 259 NLRB at 728. I find that his statement was within the parameters permitted by *Taylor-Dunn Mfg. Co.*, supra, 252 NLRB at 800. Accordingly, the allegation is dismissed.

3. Disparaging Remarks

The amended complaint alleges that during meetings held with employees from November 1990 through January 1991 Respondent's representatives made disparaging remarks against the Union organizers. Morgan testified that company representatives said that Union organizers "would become shop stewards" and " we would receive a bonus of $500 from the Union and . . . conventions in Florida we'd be able to go to that other employees would not be able to go to". Similarly, Oliver testified that Weglarz stated that the Union organizers would "we all be getting $500 bonuses from the union, and we'd be going down to Florida to play golf at the conventions".

In support of its contention that the above statements constitute violations of the Act, General Counsel cites *Montgomery Ward & Co.*, 288 NLRB 126 (1988). In that case a supervisor referred to three known union adherents as the "Mafia" or "Mexican Mafia". The administrative law judge, affirmed by the Board,, stated (at 177):

> When considered in the context of all the unlawful activity engaged in by management officials and supervisors in opposition to the Union, Gore's reference to these three leading adherents of the Union as members of the Mafia takes on an unlawful connotation. Since their prominent role on behalf of the Union was well known throughout the store, not only to the employees but to members of management, it is apparent that Gore was equating their union activity with activities of a criminal element.

General Counsel has cited no case holding that statements such as were made by Weglarz constitute a violation of the Act. Clearly *Montgomery Ward*, supra, is distinguishable. There the employer referred to the Union leaders as "Mafia". Here, Weglarz simply said that the organizers would become stewards, would receive bonuses and would attend conventions in Florida. Such statements are not the type of "disparaging" remarks which are violative of the Act. Accordingly, the allegation is dismissed.

4. Verbal Warning to Williamson

On January 7, 1991 Respondent held one of its many departmental meetings at which time Imdorf read a prepared speech. I credit Williamson's testimony that Imdorf "told us his feeling about Unions are disruptive and he feels that the plant didn't need . . . a union". During the course of his speech Imdorf asked that the employees hold their questions until after his presentation, at which point Williamson exclaimed "Yeah, he might lose his

place'". After the meeting, Fronjian asked to see Williamson. While Williamson was waiting outside Fronjian's office he met Imdorf, who told him that he "didn't care for my comment in the meeting". Imdorf testified that Williamson, "{in a very loud sarcastic, rude voice" said, "don't interrupt him, he'll lose his place." During his meeting with Williamson, Fronjian credibly testified that "I started the conversation by asking why he took a shot at Art like that, why he interrupted him and made that comment, and he said, well I a\was mad and was a little bit angry that he was reading from prepared notes."

In Caterpillar Tractor Co., 276 NLRB 1323, 1326 (1985), the Board stated:

> The Board has found that an employee's use of obscenity was protected where it constituted a spontaneous outburst during the heat of a formal grievance proceeding or contract negotiations, or was provoked by an employer's unfair labor practice. However, it is well settled that concerted activity loses its protection under the Act when the actions are malicious, defamatory, or insubordinate. It is also well established that union stewards involved in the processing of grievances lose the protection of the Act when their conduct is extraordinary, obnoxious, wholly unjustified, and a departure from the res gestae of the grievance procedure. Here, by any reasonable standard, Waner's epithets against Kemper were malicious, defamatory, insubordinate, obnoxious, and wholly unjustified. [Footnotes omitted.]

Similarly, in *Reef Industries*, 300 NLRB 956, 961 (1990) the Board affirmed the administrative law judge's decision, which stated:

> I conclude, based on the numerous authorities cited above, that the means which the employees utilized to state their protest were not so " offensive, vulgar, defamatory or opprobrious" as to exclude them from the protection of the Act. Accordingly, the protest constituted protected activity.

The January 7 meeting was one of a series of meetings called by Respondent for the purpose of giving Respondent's reasons why the employees should not vote for the Union. In Imdorf's words, Williamson said in a "loud, sarcastic, rude voice", don't interrupt him, "he'll lose his place". When Fronjian asked Williamson why he made the comment Williamson replied that he was "a little bit angry that he was reading from prepared notes". Fronjian then issued a verbal warning to Williamson.

There is no question that Williamson's remark came in the context of protected activity. I conclude that Williamson's comment was not so "offensive, vulgar, defamatory or opprobrious" as to exclude it from the protection of the Act.

5. Suspension of Williamson

On January 25, 1991 Respondent held another of its mandatory meetings to discuss the upcoming Union election. After Imdorf had completed his presentation, an employee asked "why don't you give us the respect of choosing whether to come to these meetings or not. And

not make them mandatory because it's costing us money". After Imdorf responded to that question Williamson raised his hand and said that he had a two-part question. He then asked, "how many more of these meetings are we going to have?" At that point Imdorf exclaimed, "I've heard this question over a hundred times in every meeting. I'm getting tired of this question. These meetings are going to continue until I say that we don't have these meetings anymore". Imdorf then told Williamson that he could ask his question, at which point Williamson said "you're worthless". I credit Williamson's testimony that as soon as he said that, he then said "whoa, I don't mean you personally. But the question was worthless". Several witnesses corroborated Williamson's version and indeed Fronjian also confirmed that Williamson clarified his statement by saying that the "question was worthless". Fronjian then asked Williamson to come to his office. Fronjian told Williamson that "we had this conversation once before about you . . . making comments, disruptive, rude, loud, abusive types of comments in these meetings". Fronjian then told Williamson "because of what you've done, we're going to have to suspend you pending further evaluation".

Williamson's remark of "you're worthless" came in the context of protected activity. He was angry that he was required to attend the mandatory meetings. Imdorf had just responded that "these meetings are going to continue until I say that we don't have these meetings any more". At that point Williamson exclaimed "you're worthless". I do not find that this comment was so "offensive, vulgar, defamatory or opprobrious" as to exclude it from the protection of the Act. See *Reef Industries*, supra, 300 NLRB at 961. Rather, I believe that it constituted a "spontaneous outburst" during the question and answer period. See *Caterpillar Tractor Co.*, supra,

276 NLRB at 1326. Accordingly, Respondent's suspension of Williamson violated the Act.

6. Refusal to Reinstate Williamson

After Fronjian told Williamson that he was suspended pending further evaluation Williamson became angry and told Fronjian "why don't you do what you really want to do and fire me". The complaint alleges that Respondent discharged Williamson. Respondent argues that there was no discharge, but instead, Williamson tendered his voluntary resignation. In addition, Respondent argues that Williamson committed at least two separate offenses subsequent to his meeting with Fronjian, either of which warranted his immediate discharge. I credit Williamson's testimony that he stated "why don't you do what you really want to do and fire me" and did not tender his voluntary resignation. See *Emergency One, Inc.*, 306 NLRB 800,808 (1992). Instead, I find that the suspension "pending further evaluation" was an indefinite suspension.[4]

Respondent contends that subsequent to the suspension Williamson engaged in several acts which

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[4] On January 29, 1991 Williamson wrote Imdorf asking when he could return to work. On January 31 Imdorf replied "you no longer are considered to be an employee of C & D Charter Power Systems." I believe that as of January 31 the indefinite suspension was converted into a discharge. In this connection, I note that Respondent's answer admitted paragraph 8(b) of the complaint which alleged that Respondent suspended and discharged Williamson.

"warranted his immediate discharge". Since Respondent contends that it did not discharge Williamson, presumably it is Respondent's position that these acts were the reasons why it refused to reinstate Williamson. These acts consisted of the use of profanity, damage to property and the alleged threat to kill Tice.

I credit Fronjian's testimony that after he suspended Williamson Williamson shouted "f--- you, f--- this place". A number of witnesses testified that profanity is used frequently in the plant. Indeed, Schura testified that he used profanity in front of his supervisor. I find that profanity was frequently used in the plant and Respondent's refusal to reinstate Williamson because of the profanity is pretextual. In addition, Respondent contends that Williamson damaged company property by damaging a locker. Williamson testified that when Tice came into the locker room to tell him that Respondent had "accepted his resignation" he shut his locker three times. Tice testified that after he told Williamson "I understand that you've quit", Williamson became angry and started "smashing" a locker. Haring testified that Williamson "pounded" on the locker. A number of witnesses testified as to the poor condition of the lockers. I believe that after Tice told Williamson that he "quit", Williamson became angry and slammed the locker shut and pounded it as well. The record does not show the extent of the damage, if any, Williamson caused to the locker. I find that the lockers were in poor condition and that Respondent's refusal to reinstate Williamson because he pounded the locker is pretexual. With respect to the threats, Tice testified that during the same episode, after he told Williamson that Williamson had "quit", Williamson became angry and said "I'm going to f--- kill you". Williamson denied threatening Tice. I find that Respondent has not shown by a preponderance of the evidence that the threat was made.

7. Respondent's Defenses

Respondent maintains that prior to its verbal warning and subsequent suspension of Williamson it was not aware of Williamson's "union activity involvement". I have credited Williamson's testimony that he covered over the "no" button given to him by Balmos and wrote "yes" on it. When Imdorf say it he said "there's a man who knows what he wants". In addition Williamson distributed leaflets in the cafeteria on two occasions. I also credit the testimony of several employees who testified that Williamson was outspoken at the meetings conducted by Respondent. More importantly, however, the verbal warning given on January 7 was specifically given in response to what Respondent considered a rude and sarcastic remark by Williamson. I have already found that the remark did not lose it protection under the Act. Clearly Respondent had knowledge of the remark, for it was the very reason why Williamson was disciplined. Similarly, Williamson's statement on January 25 that "you're worthless" was the very reason why he was given the indefinite suspension.

After Williamson's indefinite suspension he engaged in the use of profanity and he slammed shut and pounded his locker. Respondent maintains that these were dischargeable offenses and were the reasons why Williamson was not offered reinstatement. As discussed above, I find these reasons to be pretextual. See *Limestone Apparel Corp.*, 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982): *Arthur Young & Co.*, 291 NLRB 39 (1988). In addition, under *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981) cert. denied, 455 U.S. 989 (1982), Respondent has not sustained its burden of showing that the "same action

would have taken place even in the absence of the protected conduct". No showing has been made that employees were either discharged or denied reinstatement for similar activities.

Conclusions of Law

1. Respondent, C & D Charter Power Systems, Inc., is an employer engaged in commerce within the meaning os Section 2(2), (6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By threatening employees with plant closure if they chose to be represented by the Union, Respondent violated Section 8(a)(1) of the Act.

4. By issuing a verbal warning, suspending and discharging Robert Williamson, and by failing to offer to reinstate him, for activities protected by the Act, Respondent has violated Section 8(a)(1) and (3) of the Act.

5. The aforesaid unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

6. Respondent did not violate the Act in any other manner alleged in the complaint.

The Remedy

Having found that Respondent has engaged in certain unfair labor practices, I find it necessary to order respondent to cease and desist therefrom and to take

certain affirmative action to effectuate the policies of the Act.

Respondent, having suspended and discharged Robert Williamson in violation of the Act, I find it necessary to order Respondent to offer him full reinstatement to his former position, or if such position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of earnings he may have suffered from the time of his suspension to the date of Respondent's offer of reinstatement. Backpay shall be computed in accordance with the formula approved in *F.W. Woolworth co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[5]

Upon the foregoing findings of fact, conclusions of law and upon the entire record, pursuant to Section 10(c) of the Act, I hereby issue the following recommended.[6]

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[5] Under *New Horizons*, interest is computed at the "short-term Federal rate" for underpayment of taxes as set out in the 1988 amendment to 26 U.S.C Section 6621.

[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

Respondent, C & D Charter Power Systems, Inc., its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Threatening employees with plant closure if they choose to be represented by the Union

(b) Disciplining, suspending and discharging employees for activities protected by Section 7 of the Act.

(c) In any like or related manner interfering with, restraining or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative necessary to effectuate the policies of the Act.

(a) Offer Robert Williamson immediate and full reinstatement to his former position, or if such position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges and make him whole for any loss of earnings, with interest, in the manner set forth in the section above entitled "The Remedy".

(b) Remove from its files any reference to the unlawful suspension and discharge of Williamson and notify him in writing that this has been done and that the suspension and discharge will not be used against him in any way.

(c) Preserve and upon request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports and all other records necessary to analyze the amounts owing under the terms of this Order.

(d) Post at its facility in Huguenot, New York, copies of the attached notice marked "Appendix."[7]

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that those allegations as to which no violations have been found are hereby dismissed.

Dated, Washington, D.C. November 2, 1994

D. Barry Morris
Administrative Law Judge

[7] If this Order is enforced by the Judgement of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 95-1491 September Term, 1995

C & D Charter Power Systems,
Petitioner

v.

National Labor Relations Board,
Respondent

On Petition for Review and Cross-Application for Enforcement of an Order the National Labor Relations Board

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Before: WILLIAMS, HENDERSON and Randolph, *Circuit Judges*.

JUDGMENT

This cause came to be heard on a petition for review of an order of the National Labor Relations Board and a cross-application for enforcement, and was briefed by counsel. While the issues presented occasion no need for a published opinion, they have been accorded full

consideration by the court. See D.C. Cir.R. 36(b). It is therefore

ORDERED and ADJUDGED that the petition for review is denied and the Board's cross-application for enforcement granted. Substantial evidence supports the Board's finding with respect to the warning, suspension and dismissal of Williamson; petitioner has advanced no intelligible arguments with respect to the alleged plant-closing threat.

The clerk is direct to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See D.C. Cir.R 41. This instruction to the clerk is without prejudice to the right of any party at any time to move for expedited issuance of the mandate for good cause shown.

FOR THE COURT
Mark J. Langer, Clerk

BY:

Deputy Clerk